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FIRST AMENDMENT VALUES FOR THE INTERNET

Dawn Carla Nunziato^{a1}

INTRODUCTION

In May 2014, the Federal Communications Commission (FCC), on the ropes from two adverse D.C. Circuit decisions,¹ proposed the latest in a series of regulations of broadband providers--the entities that serve as the gatekeepers for all content, applications, and services on the Internet.² While in recent years the FCC has sought to regulate broadband providers to impose on them the duty *not* to discriminate against any of the traffic flowing through their pipes, in these latest Proposed Rules--in response to the recent D.C. Circuit decision *Verizon v. FCC*³--the FCC has sought to enable broadband providers to discriminate in favor of or against certain content.⁴ These latest Proposed Rules are inconsistent with First Amendment values. Over the past two decades, the Internet has evolved into a vast public forum for expression and into "the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen."⁵ The FCC should implement strong net neutrality rules by regulating broadband providers as common carriers and should prohibit them from discriminating in favor of or against any legal content. Doing so would not violate broadband providers' First Amendment rights. Rather, it is the absence of strong net neutrality regulations that threatens our preeminent First Amendment values: facilitating the uninhibited, robust, and wide-open marketplace of ideas; fostering the public debate and deliberation essential for the task of democratic self-government; and, in the process, protecting speech that is unpopular, disfavored, and less well-funded.

I. HISTORY OF U.S. REGULATION OF INTERNET SERVICE PROVIDERS

In the passage and subsequent interpretation of the Telecommunications Act of 1996,⁶ a central issue confronting policymakers and courts was how, if at all, access and transmission services by Internet Service Providers (ISPs) should be regulated. If regulated as "telecommunications services"⁷ under Title II of the Telecommunications Act, then such providers would be subject to common carriage regulations prohibiting them, among other things, from discriminating against any type of legal content, applications, or services.⁸ If regulated instead as "information services,"⁹ then such providers would not be subject to common carriage obligations.¹⁰ Prior to 2002, ISPs were generally narrowband or dialup and were regulated as "telecommunications services" under Title II of the Telecommunications Act and subject to common carriage obligations prohibiting them from discriminating against content and services--just as telephone services historically have been regulated.¹¹ In 1998, the FCC classified Digital Subscriber Line (DSL) services--broadband furnished over telephone lines--as "telecommunications services" since, the Commission reasoned, DSL services involved pure transmission technologies and as such were subject to Title II regulation.¹² Four years later, however, when the FCC was called upon to determine whether to classify cable broadband providers as "telecommunications services" subject to common carriage/nondiscrimination obligations, the FCC chose to classify cable broadband providers as "information services" and hence exempt from common carriage/nondiscrimination requirements.¹³ This action was subsequently upheld by the United States Supreme Court in its *Brand X* decision in 2005.¹⁴ That same year, the FCC removed common carriage/nondiscrimination obligations from all other types of broadband providers as well.¹⁵ At the time it did so, the FCC issued an "Internet Policy Statement" that embodied certain net neutrality principles, although of dubious legal effect and enforceability.¹⁶

Meanwhile, in 2007, Comcast, one of the largest broadband providers in the United States, secretly degraded legal peer-to-peer file sharing traffic.¹⁷ Comcast's actions, once discovered, prompted the FCC to issue an order censuring Comcast for violating the FCC's 2005 Internet Policy Statement, which provided in part that "consumers are entitled to access the lawful Internet content of their choice. . . . [and] to run applications and use services of their choice."¹⁸ In *Comcast v. FCC*, the D.C. Circuit, in reviewing the FCC's censure of Comcast, held in 2010 that the FCC lacked authority to enforce its Internet Policy Statement.¹⁹ The court held that, since the FCC had classified cable ISPs as "information services" instead of as "telecommunications services," the FCC had essentially waived its jurisdiction over matters involving net neutrality and net discrimination.²⁰

In response to the decision in *Comcast v. FCC*, the FCC sought to re-assert its authority to implement and enforce net

neutrality regulations and issued its 2010 Open Internet Order.²¹ The FCC's 2010 Open Internet Order claimed authority to impose net neutrality regulations under Section 706 of the Telecommunications Act, which provides that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using "measures that promote competition in the local telecommunications market" or "other regulating methods that remove barriers to infrastructure investment" and that the FCC "shall take immediate action to accelerate deployment," if necessary.²² In its 2010 Open Internet Order, the FCC found that broadband providers potentially face a variety of incentives to reduce the openness of the Internet.²³ The Commission observed that some broadband providers have an incentive to block or disadvantage edge providers to benefit their own or affiliated offerings at the expense of unaffiliated offerings.²⁴ The FCC found that reducing such openness would constitute "barriers to infrastructure investment," which the net neutrality safeguards in its 2010 Open Internet Order would remove.²⁵ The FCC found further that market discipline alone could not effectively check such behavior, given the current market power of broadband providers (in which 70% of the U.S. population has only 2 choices, while 20% has one choice, of broadband providers).²⁶

Accordingly, in its 2010 Open Internet Order, the FCC set forth the following mandates for broadband providers: (1) "Fixed broadband providers" (cable, DSL) were subject to a no blocking rule and a no unreasonable discrimination rule, as well as a rule of transparency in network management. The no blocking rule prohibited fixed broadband providers from blocking any lawful content, applications, or services. The no unreasonable discrimination rule prohibited them from engaging in unreasonable discrimination in handling network traffic. The transparency rule required them to publicly disclose accurate information regarding their network management practices, performance, and commercial terms of service.²⁷ (2) "Mobile broadband providers" were subject to a narrower no blocking rule and a rule of transparency in network management, and they were not subject to a no unreasonable discrimination rule. The no blocking rule for mobile broadband providers only prohibited them from blocking access to lawful websites or applications that compete with their own voice or video telephony services. The transparency rule required them (like fixed broadband providers) to publicly disclose accurate information regarding their network management practices, performance, and commercial terms of service.²⁸

Broadband provider Verizon challenged the FCC's 2010 Open Internet Order, claiming *inter alia* that the FCC was without authority to enact such rules, that the FCC's asserted jurisdiction under Section 706 of the Telecommunications Act was invalid, and that the FCC gave up its authority to enact such regulation when it classified broadband providers as "information services" back in 2002 instead of as "telecommunications services" subject to common carriage/nondiscrimination obligations.²⁹ Verizon also claimed that the 2010 Open Internet Order violated broadband providers' First Amendment rights. It argued that the First Amendment protects those who transmit the speech of others and who exercise editorial discretion in selecting which speech to transmit. Verizon claimed that although broadband providers generally allow all content to be transmitted, they nonetheless possess the editorial discretion *not* to do so. Because the 2010 Open Internet Order stripped providers of control over which speech they transmit and how they transmit it, and compelled the carriage of others' speech on a nondiscriminatory basis, Verizon argued, the order violates providers' First Amendment rights.³⁰

In January 2014, the D.C. Circuit struck down portions of the FCC's 2010 Open Internet Order.³¹ It determined that the no blocking rule and the no unreasonable discrimination rules were invalid, while the transparency rules were valid.³² The court determined that the FCC did not have the authority to impose the no blocking or no unreasonable discrimination rules on broadband providers without classifying them as telecommunications services subject to common carriage obligations under Title II of the Telecommunications Act.³³ Since the FCC had previously classified broadband providers as "information services" and not "telecommunications services," broadband providers could not be regulated in a manner that essentially subjected them to common carriage regulation.³⁴ Therefore, the FCC's 2010 Open Internet Order's no blocking and nondiscrimination mandates, which could only be applied to common carriers, could not be applied to broadband providers.³⁵ The court, however, upheld the transparency rules, which it found were not contingent upon providers being classified as common carriers.³⁶ Additionally, the court recognized that Section 706 of the Telecommunications Act vests the FCC with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.³⁷ It further agreed with the FCC that broadband providers represent a threat to Internet openness and could hinder future Internet development without rules similar to those in the Open Internet Order.³⁸ The court then suggested changes to the FCC's regulations that would render them more likely to be upheld.³⁹

II. THE FCC'S MAY 2014 PROPOSED RULES

On May 15, 2014, the FCC issued a Notice of Proposed Rulemaking in an effort to regulate broadband providers in a manner

that would be upheld by the courts.⁴⁰ In doing so, the Commission sought to adhere closely to the guidance provided by the D.C. Circuit in its decisions striking down the FCC's earlier efforts. These Proposed Rules include: (1) a strengthened Transparency Rule, (2) a No Blocking Rule, and (3) a No Commercially Unreasonable Practices Rule. (1) The strengthened Transparency Rule requires broadband providers to publicly disclose accurate information regarding their network management practices, performance, and commercial terms of service.⁴¹ (2) The No Blocking Rule prohibits (a) fixed broadband providers from outright blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management and (b) mobile broadband providers from blocking access to lawful websites and from blocking applications that compete with the provider's voice or video telephony services, both subject to reasonable network management.⁴² This No Blocking Rule is similar to the 2010 Open Internet Order but uses a different legal rationale. (3) The No Commercially Unreasonable Practices Rule, in lieu of the earlier Non-Discrimination Rule enables broadband providers to negotiate with edge providers to allow them to enter into paid prioritization deals for content, apps, and services.⁴³ This Rule applies only to fixed broadband providers and prohibits them from engaging in commercially unreasonable practices (with the proviso that reasonable network management shall not constitute a commercially unreasonable practice).⁴⁴ Under this Rule (which relies upon Section 706 as its jurisdictional authority⁴⁵), broadband providers would be prohibited from engaging in "commercially unreasonable" practices, as opposed to being prohibited from engaging in "unreasonable discrimination," as they were under the 2010 Open Internet Order.⁴⁶ The FCC has indicated that it would determine what constitutes a commercially unreasonable practice on a case-by-case basis, relying on a "totality of the circumstances" test.⁴⁷ The D.C. Circuit has indicated that the "commercial reasonableness" standard provides sufficient flexibility for providers to negotiate deals-- including pay-for-priority deals-- on individualized terms and therefore was not equivalent to a common carriage regime.⁴⁸ Thus, the proposed No Commercially Unreasonable Practices Rule governing broadband providers would allow broadband providers to engage in individualized negotiations with edge providers--including content providers--through which broadband providers would be able to prioritize certain content and disfavor other content, creating "fast lanes" for prioritized content and "slow lanes" for all other content. Allowing for prioritization of some content and disfavoring other content is inconsistent with our preeminent First Amendment values, as I explain below.

In this Notice of Proposed Rulemaking, the FCC also seeks comments on whether the imposition of strong net neutrality rules that prohibit broadband providers from discriminating against or blocking legal content would violate broadband providers' First Amendment rights.⁴⁹ Strong net neutrality rules would not violate the First Amendment rights of broadband providers, as I discuss below. Rather, it is the absence of strong net neutrality regulations that threatens our preeminent First Amendment values.

III. THE FCC'S PROPOSED RULES FAIL TO PROTECT OUR PREEMINENT FIRST AMENDMENT VALUES ON THE INTERNET

A. First Amendment Values: Enabling the Marketplace of Ideas, Facilitating Democratic Self-Government, and Protecting Disfavored Speech

Since Justice Oliver Wendell Holmes's exposition of the philosophical basis of the First Amendment in *Abrams v. United States* and other early twentieth century decisions, the Supreme Court's free speech jurisprudence has increasingly been grounded in protection for the open marketplace for speech--a marketplace that allows for the free trade in ideas--no matter how unpopular the speakers or the speech and regardless of whether the speaker has secured the support of the powers that be or is speaking in opposition to such powers.⁵⁰ Through its First Amendment jurisprudence, the Supreme Court has ensured that the marketplace of ideas is not distorted as a result of discrimination for or against particular speakers, subjects, viewpoints, or content. The Court has been quick to strike down regulations that favor or disfavor the speech of a particular speaker or subject, as well as regulations that favor or disfavor particular viewpoints or content, because such regulations would distort the marketplace of ideas. Although critics have argued that a real marketplace of ideas has never truly existed in real space because of the dominance of certain speakers in mass media and because of high barriers to entry in real space forums for expression,⁵¹ in the context of the Internet, these criticisms hold far less traction. Rather, the Internet has the true potential to be the paradigm marketplace of ideas.

At the same time that it has adopted the Holmesian marketplace of ideas as a foundational First Amendment organizing principle, the Supreme Court has also embraced a democratic self-governance model of the First Amendment, embracing the theory that free speech is necessary because open discussion and debate on matters affecting the public is essential to our task of democratic self-government. As Alexander Meiklejohn explained, in order for the people to have the opportunity of becoming an informed electorate, they need to be able to discuss and debate freely in a manner that is "uninhibited, robust,

and wide-open” on matters of public and societal importance and to access the speech of others on such subjects.⁵² In Meiklejohn’s words, “[The principle of the freedom of speech] is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”⁵³ When speech is regulated in such a way that favors or disfavors certain speakers or viewpoints, this “[mutilates] the thinking process of the community” by tipping the scale in favor of one side of the debate and disservices these goals of democratic self-government.⁵⁴ The Supreme Court has emphasized the importance of striking down regulations that discriminate on the basis of content or viewpoint because such regulations distort the public debate. To facilitate the First Amendment value of enabling democratic self-government, the Court has been careful to protect the public’s access to speech from a multiplicity of diverse and antagonistic sources, free from discrimination on the basis of content, viewpoint, speaker, or subject matter.⁵⁵ As the Court explained in *Turner Broadcast Systems v. FCC*,⁵⁶ “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”⁵⁷ Indeed, it has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁵⁸ The Court in particular has looked with skepticism on the wielding of private power exercised by gatekeepers of speech that would limit the public’s access to a multiplicity of sources of information, observing that, “the potential for abuse of this private power over a central avenue of communication cannot be overlooked.”⁵⁹ Indeed, in cases involving gatekeeper control by cable network operators, the Court has recognized the importance for First Amendment purposes of the government’s “taking steps to ensure that private interests [do] not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.”⁶⁰ And, just as cable network operators exercise gatekeeper power in the television market, so too do broadband providers exercise gatekeeper power over Internet access and transmission for anyone wishing to reach their subscribers, as the D.C. Circuit recently recognized.⁶¹ Such gatekeeper power should also be held in check when it threatens the public’s access to information from diverse and antagonistic sources, access which is necessary to facilitate democratic self-government.⁶²

Finally, the Supreme Court has emphasized that the protection of unpopular, disfavored, or less well-funded speech against discrimination is a preeminent First Amendment value, and one that is integral to both facilitating the marketplace of ideas and enabling the speech necessary for democratic self-government. The marketplace model itself ensures that all speech, even speech that we “loathe,” should have its chance in the marketplace.⁶³ The Court’s First Amendment jurisprudence has emphasized the importance of protecting unpopular speech against the popular will when the powers that be act to censor, financially burden, or discriminate against unpopular speech. First Amendment values require that speech not be subject to discriminatory treatment simply because “the overwhelming majority of people might find [it] distasteful or discomforting.”⁶⁴ Rather, the unpopularity of the speech is the very reason “for according it constitutional protection.”⁶⁵ As Justice Anthony Kennedy has explained, “the creation of standards and adherence to them, *even when it means affording protection to speech unpopular or distasteful*, is the central achievement of our First Amendment jurisprudence.”⁶⁶ Further, as the Court has explained, a law “is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”⁶⁷ This First Amendment value according protection to unpopular or disfavored speech extends to the protection of less well-funded speech. The Supreme Court’s public forum jurisprudence in particular has emphasized the importance of allowing for meaningful avenues of communication for poorly funded causes and speakers, who may not have the means of paying for the expression of their message if not for the availability of public forums for speech.⁶⁸ Thus, a preeminent First Amendment value is the protection of unpopular, disfavored, and less well-funded speech against financial or other types of discrimination--and the provision of meaningful forums for expression for such speech.

B. The Internet Fulfills the First Amendment’s Promise of Enabling Meaningful Forums for Free Expression

The Internet today is as much a public forum for expression as any other medium ever known or invented. Courts have recognized this, characterizing the Internet as “the most participatory marketplace of mass speech that this country - and indeed the world - has yet seen.”⁶⁹ The Supreme Court has recognized that the Internet is a forum where any speaker “can become a town crier with a voice that resonates farther than it could from any soapbox.”⁷⁰ As such, the Internet comes closer to delivering on the First Amendment’s promise of enabling meaningful forums for free expression than any other space or forum ever known or invented.

Real space forums for expression are imperfect but the Internet isn’t-- yet. While some mediums for expression in real space have suffered from high barriers to entry and control by gatekeepers (like cable and broadcast) or by dominance by a handful of well-funded speakers (like major newspapers), the Internet has come very close to fulfilling the First Amendment’s promise of being a truly democratic, open, and accessible medium of expression--one that hasn’t allowed for discrimination on the basis of content, viewpoint, or speaker identity. Access to the Internet until now has operated much like access to a

public forum for expression, like the ability enjoyed by every citizen to speak freely in a public park or on a public street or sidewalk-- without fear of discrimination on the basis of the content or viewpoint of her speech or on the basis of her identity. The courts, Congress, and even the FCC in the past have worked to advance a vision and a reality of the Internet that directly embodies our First Amendment values--an open Internet that fosters a vast, democratic marketplace for speech with low barriers to entry; a vibrant Internet that is “uninhibited, robust, and wide-open”; and an nondiscriminatory Internet that protects and facilitates speech that is disfavored, unpopular, or less well-funded.⁷¹

C. The FCC’s Proposed Rules, by Allowing Broadband Providers to Discriminate Against Content, Are Inconsistent With First Amendment Values

The FCC’s proposed regulation of the Internet to allow the Internet’s gatekeepers to favor some content--either their own or affiliated content, or third party content upon payment of a fee-- and to disfavor other content is inconsistent with our preeminent First Amendment values.⁷²

Through the no-commercially-unreasonable-practices provision, the Proposed Rules allow for broadband providers to prioritize some content (to provide fast lane treatment for some content over others), including prioritization of the broadband provider’s own and affiliated content and the paid prioritization of other edge providers’ content.⁷³ Although the Proposed Rules prohibit outright blocking (censorship) of content,⁷⁴ the Rules allow for prioritization of some content (fast lane treatment) and corresponding degradation of other content (slow lane treatment).⁷⁵ Even though such treatment is not outright censorship, it is nonetheless inconsistent with First Amendment values. Degradation of transmission of content (slow lane treatment), especially latency-sensitive content like video, is the practical equivalent of blocking or censoring such content for Internet users. The average Internet user is intolerant of even miniscule delays in the transmission of content. Internet users are quick to click away if anything takes too long, even by fractions of a second.⁷⁶ Four out of five Internet users will click away if a video stalls while loading.⁷⁷ Thus, slow lane treatment for Internet content is the practical equivalent of blocking such content, given the realities of Internet users’ experience.

Further, the Proposed Rules do not even require that broadband providers offer the same prioritization arrangements to all comers, as does the United States Postal Service or carriers like UPS, which offer fast lanes to any and all who can afford to pay.⁷⁸ Allowing broadband providers the discretion to pick and choose favorites for preferential fast lane treatment will operate to disadvantage less well-financed, disfavored, and unpopular content. It will also allow for and result in discrimination on the basis of viewpoint and content by broadband providers, which is inconsistent with First Amendment values.

Allowing for Internet gatekeepers to prioritize some content and disfavor other content is inimical to the marketplace of ideas because such prioritization results in the skewing and distortion of the marketplace of ideas. For example, the Proposed Rules would permit Verizon to allow for paid prioritization/fast lane treatment for Fox News video content, while not according paid prioritization/fast lane treatment for Al Jazeera News video content, resulting in discrimination on the basis of content or viewpoint and skewing the marketplace of ideas. Burdening speech or discriminating against speech within a forum like the Internet because of the speech’s unpopularity is inconsistent with our First Amendment values.⁷⁹ The Supreme Court has held that “speech cannot be . . . burdened, any more than it can be punished or banned, [because of its unpopularity].”⁸⁰

Further, under the Proposed Rules, broadband providers would be allowed to charge a premium for fast lane service that less well-financed content providers, including noncommercial and nonprofit organizations, will not be able to afford.⁸¹ For example, Verizon may choose to allow for paid prioritization for CBS’s video content while NPR may not be able to afford to pay the premium Verizon requires for paid prioritization. Allowing for fast lane treatment of some content while relegating other content to slow lane treatment is also inconsistent with the notion of equal treatment of speakers within a public forum for expression. Such a regime would be inconsistent with the First Amendment value of protecting unpopular, disfavored, or less well-funded speech--the “central achievement of our First Amendment jurisprudence.”⁸² In short, under the Proposed Rules, broadband providers have the incentive to engage in precisely the sort of content-based, viewpoint-based, and subject-matter based regulations of speech that are antithetical to our pre-eminent First Amendment values.

Finally, the Proposed Rules’ “minimum level of access” requirement is not sufficient to protect First Amendment values on the Internet.⁸³ The reason is more fundamental than the concerns about administrability⁸⁴ and usability⁸⁵ that some critics have asserted. The more fundamental problem is that any concept of threshold (e.g., minimum level) is problematic because unpopular, disfavored, or less well-funded speech will likely suffer from the disparity necessarily introduced by the threshold

concept. Providers will inevitably maintain--and profit from--the disparity in performance, such that the fast(er) lane, which exceeds the minimum level of access, will remain meaningful as a relative concept. From an economic perspective, the disparity allows for competition and financial gain. From a First Amendment perspective, the disparity risks discrimination. History urges caution regarding disparities in matters of fundamental rights like free speech interests, and suggests that from disparity it is but a short distance to discrimination.⁸⁶ A separate and unequal slow lane should justifiably raise concerns about First Amendment (and other constitutional) values on the Internet.

D. If Unregulated, Broadband Providers Will Likely Discriminate Against Some Content and In Favor of Other Content

The possibility that broadband providers, if given the opportunity, will discriminate against expression on the basis of its viewpoint or content is not merely theoretical. Similar types of discrimination have already occurred in related contexts. Consider the actions of Verizon Wireless in restricting the ability of a pro-choice organization to transmit SMS messages. In 2007, Verizon Wireless refused to allow NARAL Pro-Choice America to transmit such messages *to NARAL's own members*. Asserting its authority to block messages from any group that seeks to “distribute content that, in [Verizon’s] discretion, may be seen as *controversial or unsavory to any of our users*,” Verizon initially refused to facilitate the transmission of such messages to certain Verizon customers--even when those users had expressly signed up to receive NARAL’s messages. In that case, Verizon ultimately bowed to public pressure (after it was subject to criticism in a front page article in the New York Times) and reversed course, all the while maintaining that it enjoyed the discretion to determine in the future which text messages to facilitate and which to prohibit.⁸⁷ Although the mainstream media in that case imposed a sufficient check on Verizon Wireless’s content and viewpoint discrimination, the fact remains that wireless and broadband providers have an incentive to discriminate against content that is disfavored, poorly funded, or unpopular.

T-Mobile’s censorship of SMS messages connected to legal medical marijuana services provides a further example of discrimination against such controversial or unpopular content. In September 2010, T-Mobile blocked all messages going to or coming from EZ Texting, a marketing company that enables its clients to provide short code text messaging. T-Mobile did so because EZ Texting had contracted with the Legal Marijuana Dispensary, a web service that provides information regarding access to medical marijuana in states where it is legal. T-Mobile found Legal Marijuana Dispensary content to be “objectionable” and sought to block *all* text messages to or from intermediary EZ Texting--regardless of whether the messages involved the Legal Marijuana Dispensary--even after EZ Texting agreed to drop Legal Marijuana Dispensary as a client. In EZ Texting’s lawsuit, T-Mobile asserted that it had the discretion to refuse to facilitate content of which it did not approve.⁸⁸

Discrimination on the basis of content, viewpoint, subject matter, or speaker identity within a public forum like the Internet by those who hold the reins of power is inconsistent with First Amendment values. Because of the importance of protecting an open marketplace of ideas and enabling public discussion and debate on matters of public importance, allowing broadband providers to enter into paid prioritization deals with favored content providers and degrading the transmission of disfavored, poorly funded, or unpopular content will not adequately protect our preeminent First Amendment values. To accord meaningful protection for such values, broadband providers-- as gatekeepers responsible for the free flow of information on “the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen”⁸⁹--should be subject to strong net neutrality rules that prohibit discrimination in favor of or against any legal content.

E. The FCC Should Regulate Broadband Providers as Common Carriers

The FCC should correct the mistake it made in 2002 when it declined to classify broadband providers as “telecommunications services” subject to common carriage obligations under the Telecommunications Act of 1996. As President Obama has recently argued⁹⁰ the FCC should reclassify broadband providers as telecommunications services subject to common carriage obligations to remedy once and for all the problems that it wrought in 2002 by declining to so regulate broadband providers.

The common carriage doctrine imposes obligations on private speech conduits to facilitate the expression of others and prohibits these conduits from exercising the discretion to determine which communications to facilitate and which to censor. Since the beginning of the modern communications era in the 1930s, the FCC has imposed obligations on providers of interstate communications services (like telephone and telegraph companies) to facilitate the transmission of all legal content. The United States Postal Service has also been regulated as a common carrier that is required to facilitate the transmission of

all legal content and is prohibited from discriminating against such content.⁹¹ As Ithiel de Sola Pool explains:

[T]he law of common carriage protects ordinary citizens in their right to communicate. . . . [This doctrine] rests on the . . . assumption that, in the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate. The rules against discrimination are designed to ensure access to the means of communication [T]his . . . element of civil liberty is central to [the law of common carriage].⁹²

The common carriage status of communications providers benefits members of the public by granting them access to communications conduits under a nondiscrimination principle. As Jerome Barron explains, individuals who rely on common carriers to facilitate their communications “benefit from the democratic egalitarianism which characterizes the non-discriminatory access principle associated with common carrier law.”⁹³

The common carriage doctrine in the United States has its roots in the early English law of common carriage,⁹⁴ under which private entities that served the public in the performance of important public functions were charged with certain obligations. At English common law, the common carriage doctrine was a vehicle for imposing obligations on private entities that performed important functions for the benefit of the public, similar to those assumed by the government itself.⁹⁵ By imposing obligations on certain private entities to facilitate the transport and, ultimately, the communications of others, the common carriage doctrine rejected the principle that private entities may regulate transportation and communication however they choose, with their conduct held in check by the market only.

In the mid-1880s, Congress began to regulate American telegraph companies in a manner akin to common carriers. Even though telegraph companies (like broadband providers today) did not enjoy monopoly power within their market, Congress conditioned certain valuable privileges for telegraph companies on their agreement to be subject to common carriage obligations.⁹⁶ In 1893, the Supreme Court ruled that, like common carriers, telegraph companies were required to provide service without discrimination.⁹⁷ Two decades later, in the Mann-Elkins Act of 1910, Congress extended common carrier obligations to a host of early telecommunications providers, including telegraph, telephone, and cable providers.⁹⁸

Congress overhauled the regulation of telecommunications providers in the Communications Act of 1934,⁹⁹ which charged the newly-created Federal Communications Commission with regulatory authority over telecommunications providers (telegraph and telephone companies), regardless of whether they enjoyed monopoly power, and imposed additional common carriage regulations on such providers.¹⁰⁰ Under the 1934 Act, common carriers are charged with the obligation to serve as transparent conduits for all (legal) content originated by others.¹⁰¹ The role of a common carrier, like the telephone company, is neither to generate content nor to make editorial or qualitative decisions regarding which content to carry and which to censor.¹⁰² Common carriers are prohibited from “mak[ing] individualized decisions, in particular cases, whether and on what terms to deal,”¹⁰³ and do not enjoy independent First Amendment rights to exercise editorial discretion.¹⁰⁴ Unlike newspaper publishers, for example, common carriers are not entitled to engage in editorial discretion to determine which content to transmit and which to censor.¹⁰⁵ The content transmitted by a common carrier—unlike that transmitted by a newspaper publisher—is not subject to editorial control or discretion.¹⁰⁶ As such, common carriers are distinct from publishers or other editors who enjoy their own First Amendment rights to exercise editorial discretion in their selection and exclusion of content.¹⁰⁷

Throughout the mid-twentieth century, common carriage/nondiscrimination obligations were applied to traditional conduits of communication like telephone companies.¹⁰⁸ In the early 1970s, the FCC began to consider whether and to what extent to impose common carriage obligations on computer-assisted processes and services.¹⁰⁹ In a series of “Computer Inquiries,” the FCC essentially created two categories of computer-assisted communications services: basic services and enhanced services.¹¹⁰ “Basic” (later, “telecommunications”) services, like telephone and facsimile services, were those that offered straightforward transmission services, and those offering such services were regulated as common carriers and made subject to the requirement that they not discriminate on the basis of content.¹¹¹ “Enhanced” (later, “information” services) were those in which computer processing applications were implemented to act on a subscriber’s information, and providers of such services were exempt from common carriage/nondiscrimination requirements.¹¹²

In 1996, in its passage of the Telecommunications Act of 1996, Congress revisited the categorization of services subject to common carriage regulation that was established under the Computer Inquiries.¹¹³ Under the 1996 Act, “telecommunications” services were made subject to common carriage regulation (replacing the category of “basic services”), while “information services” were exempted from common carriage regulation (replacing the formerly exempt category of “enhanced

services”).¹¹⁴ The Act maintained significant common carrier obligations on providers of “telecommunications services,” while leaving “information services” providers subject to far less regulation.¹¹⁵

The Act defined “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.”¹¹⁶ The FCC has ruled that, despite the changes in nomenclature, the basic distinctions between these two categories remain the same. The 1996 Act changed the rights and responsibilities of common carriers by specifying more precisely the obligations that common carriers must assume.¹¹⁷ While the Act creates a presumption that telecommunications carriers will be treated as common carriers, it authorized the FCC to forbear from enforcing any provision of the Act if the FCC determines that such enforcement is unnecessary to guard against discrimination, to ensure just and reasonable services, to safeguard consumers, or to serve the public interest.¹¹⁸ Title II of the Communications Act sets forth a complex regulatory regime imposed upon common carriers, but the essential duty imposed upon common carriers is the duty not to discriminate in the offering of their services, and in particular, not to discriminate against certain types of content in serving as conduits for the transmission of such content.

In the passage and interpretation of the Telecommunications Act, a central issue confronting policymakers and courts was how, if at all, the provision of Internet access by cable providers (and the provision of broadband Internet access more generally) should be regulated. If regulated as “telecommunications services,” then providers of broadband Internet access would be subject to common carriage regulation prohibiting them, among other things, from discriminating against any type of legal content (and requiring them to allow interconnection by unaffiliated ISPs).¹¹⁹ If regulated instead as providing only “information services,” then providers of broadband Internet access would be free of such common carriage obligations.

In its 2002 “Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities”¹²⁰ (hereinafter “Declaratory Ruling”), the FCC concluded that cable modem service was an “information service” with “no separate offering of telecommunications service,”¹²¹ the latter of which would have rendered such services subject to common carriage obligations. The Commission ruled that the provision of cable broadband service does not contain a separate telecommunications service because the transmission of the data is “part and parcel” of that service, and is integral to its capabilities.¹²² As an “information service” with “no separate offering of telecommunications service,” cable operators’ provision of broadband Internet access was exempted from the common carrier regulations of Title II of the Communications Act. This ruling by the FCC is significant in that it reverses course on the history of the Commission’s regulation of telecommunications services. Throughout the 1970s and 1980s, the FCC formulated and implemented a workable distinction between the underlying common carrier network, on the one hand, and the services and information made available over that network, on the other. The 2002 Declaratory Ruling collapsed this crucial distinction and for the first time permitted network operators to discriminate against the content they were charged with transmitting over their networks.

The decision by the FCC to exempt cable broadband from common carriage obligations was challenged by unaffiliated ISPs who asserted the right to interconnect with cable providers’ pipelines and sought a ruling that cable broadband should be regulated as the provision of a telecommunications service subject to common carriage obligations. In a case that former FCC Commissioner Michael Copps described as involving nothing less than the “future of the Internet,”¹²³ the Supreme Court in *Brand X* determined that the FCC enjoyed the discretion to interpret the Telecommunications Act as it had done in its Declaratory Ruling to decline to subject cable operators’ provision of broadband Internet access--or the provision of any other type of broadband Internet access--to nondiscrimination/common carriage obligations. Rather, as providers of “information services,” they are subject to less stringent regulation under the Act under the FCC’s Title I “ancillary authority,” under which the FCC enjoys the authority to impose requirements that are “reasonably ancillary to existing Commission Statutory authority.”¹²⁴ The Commission found that cable broadband providers offer “a single, integrated service that enables the subscriber to utilize Internet access service . . . and to realize the benefits of a comprehensive service offering,”¹²⁵ and concluded that the integrated service provided was an “information service,” without a separate component “telecommunications service” that would render the providers subject to common carriage regulation. The FCC grounded its decision, in part, on the policy judgment that “broadband service should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.”¹²⁶

The Supreme Court’s decision to allow the FCC the discretion to roll back common carriage obligations on cable and other broadband providers heralded a substantial blow for free speech on the Internet. After the *Brand X* decision, the FCC subsequently removed common carriage regulations from every other type of broadband provider. One month after the *Brand X* decision was handed down, the FCC ruled that DSL, like cable broadband, was also an “information service,” and that therefore telephone companies’ provision of broadband Internet access via DSL would no longer be subject to common carriage requirements.¹²⁷ The FCC subsequently ruled that all other types of broadband are likewise exempt from common

carriage/nondiscrimination regulations.¹²⁸ Accordingly, decisions about what speech to censor and what speech to facilitate were left to the discretion of the companies providing broadband Internet access.

The FCC's fundamental misstep in removing common carriage, nondiscrimination obligations from broadband providers (later approved by the Supreme Court in *Brand X*) was its determination that cable operators providing broadband Internet access were not-- in whole or in part--offering "telecommunications services" and were therefore not subject to regulation as common carriers or pure communications conduits.¹²⁹ The Commission erred by prioritizing the very limited editorial role of cable broadband providers over the much weightier free speech interests of members of the public who necessarily rely on broadband providers to serve as conduits for their expression.

In regulating broadband providers, Congress and the FCC should be guided by the principle underlying modern communications law that liberal democracies require a well-informed citizenry, which in turn requires that citizens enjoy the freedom to communicate and to access communications conduits on a nondiscriminatory basis. The same principles that justify regulating telephone and telegraph operators and the postal service as common carriers subject to nondiscrimination requirements--in order to "protect ordinary citizens in their right to communicate"¹³⁰--are valid today with regard to Internet communications.

The recent regulatory state of affairs in the Internet context, which allows broadband providers to discriminate against whatever content or applications they choose for whatever reasons they choose, is inconsistent with the historical progression of according individuals protection in their freedom to communicate. Broadband providers should be subject to regulation as "telecommunications services" requiring them to assume at least the nondiscrimination obligations that historically have been imposed upon common carriers--the duty to facilitate and transmit in a nondiscriminatory manner any and all legal content.

F. Strong Net Neutrality Regulation Prohibiting Broadband Providers from Blocking or Discriminating Against Legal Content Would Not Infringe Providers' First Amendment Rights

In its May 2014 Notice of Proposed Rulemaking, the FCC requested comment on whether the imposition of strong net neutrality rules-- prohibiting broadband providers from discriminating in favor of or against legal content--would violate broadband providers' First Amendment rights.¹³¹ Such rules would not violate broadband providers' rights, despite broadband providers' repeated arguments to the contrary, as I discuss below.

Broadband providers like Verizon have long argued that they enjoy the First Amendment right to favor or disfavor the Internet content of their choosing and that nondiscrimination and no-blocking rules would violate their free speech rights. Even while claiming that they do not actually discriminate against expression and that they in fact allow for the free flow of all types of content, they claim that their primary role for First Amendment purposes is similar to that of a newspaper editor-- that of a selector or editor of the Internet's content and as a speaker in their own right, not as a conduit for the communications of others. They characterize their role as such to bolster their right to favor or disfavor the content of their choosing and to shore up their First Amendment rights under existing precedent. Verizon, for example, claims that its role in providing broadband access, for First Amendment purposes, is no different than a newspaper publisher's-- an editor or selector of content.¹³² The Supreme Court has held that government interference with newspaper publishers' discretion, such as by requiring newspapers to publish content not of their choosing, violates the newspapers' First Amendment rights.¹³³ Verizon argues that the imposition of non-discrimination and no-blocking rules on broadband providers would present the same First Amendment concerns that regulation of newspapers has historically created.

Broadband providers' efforts to cast themselves primarily in the role of speakers or editors in opposing strong net neutrality regulations misconstrue the realities of broadband Internet access and misinterpret First Amendment case law and policy. In providing broadband Internet access, broadband providers function for First Amendment purposes as conduits for the speech of others, not as speakers or editors in their own right. Broadband providers' primary function is to serve as a conduit or pipeline for the speech of others. When we analyze where on the First Amendment spectrum-- pure conduit versus pure editor--broadband providers fall with respect to their provision of broadband access, the functions that broadband providers serve place them on the conduit end not on the editor end. Accordingly, regulation of their conduit function to protect the free flow of information would not violate providers' First Amendment rights.

Even assuming that broadband providers enjoy some minimal First Amendment interest in the conduit functions they perform, strong net neutrality regulations that prohibit the blocking of and discrimination against legal content would be

analyzed and upheld by courts as content-neutral regulations of speech that survive intermediate scrutiny. In *Turner Broadcasting Systems v. Federal Communications Commission*, cable network operators objected to “must carry” rules imposed by the FCC that required them to carry certain broadcast programming not of their choosing and that limited their editorial discretion over the content that could be provided over their cable channels. The Court specifically rejected the analogy the cable operators sought to draw between their First Amendment rights and those of newspaper publishers and held that the First Amendment editorial rights of the cable network operators were quite limited.¹³⁴ The Court distinguished the amount and type of control that cable network operators exercise over the communications received by their subscribers from the editorial discretion exercised by newspapers. It held further that, in contrast to a newspaper, a cable operator enjoys “bottleneck, or gatekeeper, control over most . . . programming that is channeled into the subscriber’s home” and that “simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.”¹³⁵ The Court concluded that the FCC enjoyed the power, consistent with the First Amendment, to “ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.”¹³⁶

While recognizing that the must carry rules interfered to some extent with the First Amendment rights of cable network operators, the Court ultimately held in *Turner II* that these regulations were justified in light of the control that cable operators exert over the free flow of information and ideas.¹³⁷ It held that the challenged must carry regulations survived intermediate scrutiny because they were content-neutral and did not burden more of the cable operators’ speech than necessary to further the government’s important interests.¹³⁸ In his concurring opinion in *Turner II*, Justice Breyer explained that the must carry regulations served the purpose of advancing the national communications policy of protecting “the widest possible dissemination of information from diverse and antagonistic sources” and “facilitat[ing] the public discussion and informed deliberation [that] . . . democratic government presupposes and the First Amendment seeks to achieve.”¹³⁹ Breyer concluded that although there were First Amendment interests “on both sides of the equation,” the must carry regulations struck a reasonable balance between potentially speech-restricting consequences for cable operators and speech-enhancing consequences for members of the public.¹⁴⁰

As in *Turner II*, the imposition of strong net neutrality regulations on broadband providers prohibiting discrimination in favor of or against content and prohibiting the blocking of content would be scrutinized as content-neutral regulations that would survive intermediate scrutiny. The free speech interests of members of the public in having broadband providers serve as neutral conduits for our communications are even more pressing than in the *Turner II* context. Like the regulations at issue in *Turner II*, but to an even greater extent, strong net neutrality regulations advance the substantial government interest of protecting the public’s meaningful access to the free flow of information and ideas—including meaningful access to disfavored, poorly funded, and unpopular expression. Even if broadband providers were able to convince a court that their First Amendment interests were implicated by such regulation—and they are implicated far less than cable operators’ interests in *Turner II*, if at all—*Turner II* would dictate the conclusion that such interests were outweighed by the countervailing free speech interests in promoting broad information dissemination, public discussion, and deliberation. The predominant free speech interests implicated by strong net neutrality regulations are those of members of the public in nondiscriminatory access to the expression they seek to send and receive, not those of the broadband providers in providing broadband Internet access. The public’s free speech interests outweigh whatever minimal interests might be asserted by broadband providers and therefore strong net neutrality regulation—imposing nondiscrimination and no-blocking rules on broadband providers—would not violate the First Amendment rights of broadband providers.

IV. CONCLUSION

When the FCC first removed common carriage/ nondiscrimination obligations from broadband providers in 2002, it abandoned the United States’ long history of regulating telecommunications providers (like telephone and telegraph providers) to require them not to discriminate against the content they were charged with transmitting. The FCC chose instead to entrust the protection of Internet users’ free speech interests to the market—and to a highly imperfect market at that¹⁴¹—one in which most Internet users have no meaningful choice as to broadband provider. Under the FCC’s current Proposed Rules, broadband providers would be free to prioritize whatever content they choose and to discriminate against disfavored content. Given the freedom to do so in the past, intermediaries for expression have indeed discriminated against content in a variety of ways—including against social and political expression and other content that is highly valued within our constitutional scheme. It should come as no surprise that they would do so. As unregulated market actors, these speech intermediaries have various incentives to favor some and to discriminate against other content—including content that is disfavored, poorly funded, unpopular or otherwise conflicts with their own political, economic, or other interests. Allowing

broadband providers to discriminate in this manner is inconsistent with our First Amendment values. As the Supreme Court explained in *Turner*, our nation's First Amendment values require "the widest possible dissemination of information from diverse and antagonistic sources."¹⁴³ Regulation of powerful speech intermediaries, pursuant to our national communications policy, is essential to "facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve. . . . [A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."¹⁴³

To advance First Amendment values in the Internet age, the FCC should correct once and for all the mistakes it made in 2002 and impose on broadband providers the nondiscrimination and no-blocking obligations that historically have been imposed on conduits for communication. To fulfill the Internet's promise of being "the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen,"¹⁴⁴ those who serve as powerful gatekeepers for expression on the Internet should be regulated consistent with First Amendment values to ensure that they act as good stewards within this marketplace. The Internet should remain free from discrimination, prioritization, degradation, blocking, or other censorship, consistent with the First Amendment values that are necessary to facilitate the marketplace of ideas and the public discussion and informed deliberation that democratic government requires.

APPENDIX: THE FCC'S PROPOSED RULES

Proposed Rules

Part 8 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 8- PROTECTING AND PROMOTING THE OPEN INTERNET

Sec.

8.1 Purpose.

8.3 Transparency.

8.5 No Blocking.

8.7 No Commercially Unreasonable Practices.

8.9 Other Laws and Considerations.

8.11 Definitions.

§ 8.1 Purpose.

The purpose of this Part is to protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.

§ 8.3 Transparency.

(a) A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services, in a manner tailored (i) for end users to make informed choices regarding use of such services, (ii) for edge providers to develop, market, and maintain Internet offerings, and (iii) for the Commission and members of the public to understand how such person complies with the requirements described in sections 8.5 and 8.7 of this chapter.

(b) In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall include meaningful information regarding the source, timing, speed, packet loss, and duration of congestion.

(c) In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall publicly disclose in a timely manner to end users, edge providers, and the Commission when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or "best effort" service as distinct from any priority service.

§ 8.5 No Blocking.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

§ 8.7 No Commercially Unreasonable Practices.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not

engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.

§ 8.9 Other Laws and Considerations.

Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

§ 8.11 Definitions.

(a) Block. The failure of a broadband Internet access service to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers.

(b) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

(c) Edge Provider. Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

(d) End User. Any individual or entity that uses a broadband Internet access service.

(e) Fixed broadband Internet access service. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(f) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

(g) Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

Footnotes

^{a1} © Dawn Carla Nunziato 2014, Professor of Law, George Washington University Law School. I am grateful to Scott Luan for his outstanding research assistance. I am also grateful to the editors of the First Amendment Law Review for their excellent work on this article.

¹ See generally [Verizon v. F.C.C.](#), 740 F.3d 623 (D.C. Cir. 2014); [Comcast v. F.C.C.](#), 600 F.3d 642 (D.C. Cir. 2010).

² See generally [Protecting & Promoting the Open Internet](#), Notice of Proposed Rulemaking, 79 Fed. Reg. 37,448 (proposed July 1, 2014) [hereinafter "NPRM"] .

³ 740 F.3d 623 (D.C. Cir. 2014).

- ⁴ See NPRM, *supra* note 2, at 37,449.
- ⁵ [A.C.L.U. v. Reno](#), 929 F. Supp. 824, 881 (E.D. Pa. 1996) *aff'd*, 521 U.S. 844 (1997).
- ⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).
- ⁷ Telecommunications Act of 1996 § 3(a)(51), [47 U.S.C. § 153\(53\)](#) (2013).
- ⁸ See [Brand X v. F.C.C.](#), 545 U.S. 967, 97576 (2005).
- ⁹ Telecommunications Act of 1996 § 3(a)(24), [47 U.S.C. § 153\(24\)](#) (2013); *Brand X*, 545 U.S. at 97576.
- ¹⁰ See [Brand X](#), 545 U.S. at 975.
- ¹¹ See *id.* at 977-78.
- ¹² See Memorandum Op. & Order, & Notice of Proposed Rulemaking, 13 FCC Rcd. 24,011, 24,014, 24,029-30 (1998).
- ¹³ See [Declaratory Ruling & Notice of Proposed Rulemaking](#), 17 F.C.C. Rcd. 4798, 4823-24 (2002).
- ¹⁴ [Brand X](#), 545 U.S. at 1001-02.
- ¹⁵ See, e.g., Report & Order & Notice of Proposed Rulemaking, 20 F.C.C. Rcd. 14,853, 14,862 (2005); Declaratory Ruling, 22 F.C.C. Rcd. 5901, 5901-02 (2007); Memorandum Op. & Order, 21 F.C.C. Rcd. 13,281, 13,281 (2006).
- ¹⁶ Policy Statement, 20 F.C.C. Rcd. 14,986, 14,988 (2005) (asserting that, in order “[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice ... run applications and use services of their choice ... connect their choice of legal devices that do not harm the network ... [and] competition among network providers, application and service providers, and content providers.”).
- ¹⁷ See Memorandum Opinion & Order, 23 F.C.C. Rcd. 13,028, 13,031-32 (2008).
- ¹⁸ *Id.* at 13,083 (quoting Policy Statement, 20 F.C.C. Rcd. 14,986, 14,988 (2005)).
- ¹⁹ [Comcast v. F.C.C.](#), 600 F.3d 642, 661 (D.C. Cir. 2010).
- ²⁰ See *id.*
- ²¹ See generally Report & Order, 25 FCC Rcd. 17,905 (2010) [[hereinafter “Open Internet Order”]].
- ²² [47 U.S.C. § 1302\(a\)](#); *Open Internet Order*, *supra* note 21, at 17,972.
- ²³ *Open Internet Order*, *supra* note 21, at 17,915-22.

²⁴ *Id.* at 17,915-19.

²⁵ *Id.* at 17,968 (internal citation omitted).

²⁶ *Id.* at 17,923.

²⁷ *Id.* at 17,906.

²⁸ *Id.*

²⁹ Notice of Multicircuit Petitions for Review, Pet. for Rev. of FCC's In the Matter of Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52, Report and Order. [25 FCC Rcd 17,905 \(2010\)](#), MDL No. ____, DC/1:11-ca-01356, (J.P.M.L., October 5, 2011).

³⁰ *See id.* at 26.

³¹ [Verizon v. F.C.C., 740 F.3d 623, 628 \(D.C. Cir. 2014\)](#).

³² *Id.*

³³ *See id.* at 650, 657-659.

³⁴ *See id.* at 655.

³⁵ *See id.* at 658-59.

³⁶ *Id.*

³⁷ *Id.* at 628.

³⁸ *Id.* at 645-46.

³⁹ *Id.* at 656-58.

⁴⁰ *See* NPRM, *supra* note 2, at 37,448; [Protecting & Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 \(2014\)](#) (releasing the rules).

⁴¹ NPRM, *supra* note 2, at 37,456-59.

⁴² *Id.* at 37,460-63.

⁴³ *Id.* at 37,463-67.

⁴⁴ *Id.* at 37,464.

Id.

Id. at 37,463-64.

See NPRM, *supra* note 2, at 37,466.

Cellco P'ship v. F.C.C., 700 F.3d 534, 548 (D.C. Cir. 2012) (upholding data roaming order).

See NPRM, *supra* note 2, at 37,469.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market That, at any rate, is the theory of our Constitution.”). *See e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

See, e.g., *Miami Herald v. Tornillo*, 418 U.S. 241, 251 (1974) (describing critics’ argument that “[the] First Amendment interest of the public in being informed is ... in peril because the ‘marketplace of ideas’ is today a monopoly controlled by the owners of the market.”)

ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26-27 (1948). *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

MEIKLEJOHN, *supra* note 52, at 26-27.

Id.

Texas v. Johnson 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

512 U.S. 622 (1994).

Id. at 663.

Id. (internal quotations omitted).

Id. at 657.

Id.

Verizon v. F.C.C., 740 F.3d 623, 646 (D.C. Cir. 2014).

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (stating that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”).

⁶³ [Abrams v. United States](#), 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.... [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”).

⁶⁴ [Virginia v. Black](#), 538 U.S. 343, 358 (2003) (citations omitted).

⁶⁵ [Simon & Schuster, Inc. v. Members of N.Y. State Crimes Victims Bd.](#), 502 U.S. 105, 118 (1991) (citations omitted).

⁶⁶ [Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.](#), 518 U.S. 727, 784 (1996) (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

⁶⁷ [Simon & Schuster](#), 502 U.S. at 115.

⁶⁸ See, e.g., [Forsyth Cnty., Ga. v. Nationalist Movement](#), 505 U.S. 123 (1992) (protecting unpopular group’s access to public forum).

⁶⁹ [A.C.L.U. v. Reno](#), 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

⁷⁰ [Reno v. A.C.L.U.](#), 521 U.S. 844, 870 (1997).

⁷¹ See [N.Y. Times Co. v. Sullivan](#), 376 U.S. 254, 270 (1964) (holding the First Amendment represents a national commitment to “uninhibited, robust, and wide-open” debate).

⁷² See generally NPRM, *supra* note 2, at 37,447.

⁷³ See *id.* at 37,464, 37,480 (stating that the “commercially reasonable” requirement “could permit broadband providers to serve customers and carry traffic on an individually negotiated basis, ‘without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,’ so long as such conduct is commercially reasonable.”).

⁷⁴ *Id.* at 37,460-61.

⁷⁵ *Id.* at 37,480.

⁷⁶ Urs Hoelzle, *The Google Gospel of Speed*, THINK QUARTERLY (January 2012), <https://www.thinkwithgoogle.com/articles/the-google-gospel-of-speed-urs-hoelzle.html> (last visited January 22, 2015).

⁷⁷ Don Reisinger, *Most People Say No to Slow Online Video*, (December 11, 2009 12:53 PM PST), <http://www.cnet.com/news/most-people-say-no-to-slow-online-video/>.

⁷⁸ See NPRM, *supra* note 2, at 37,461 (stating that “we must permit providers to ‘adapt ... to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.’”).

- ⁷⁹ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (“[Public] speech cannot be restricted simply because it is upsetting or arouses contempt.”).
- ⁸⁰ *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992).
- ⁸¹ NPRM, *supra* note 2, at 37,480.
- ⁸² See *supra* text and quotation accompanying note 62.
- ⁸³ The Proposed Rules define blocking as “[t]he failure of a broadband Internet access service to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers.” See § 8.11(a).
- ⁸⁴ See, e.g., Comments of Vimeo, LLC, In the Matter of Protecting and Promoting the Open Internet, 59 Fed. Reg. 37, 448 (July 15, 2014) (No. 14-28) at 10 (“[M]easuring minimum performance in terms of a broadband provider’s ‘best efforts’ or an ‘objective, evolving reasonable person standard’ will complicate enforcement. These types of inquiries may require expert evidence and/or consumer surveys. As a result, filing a regulatory complaint would be a time and resource intensive affair that would provide little certainty of outcome. This process is not well suited to an industry that is characterized by constant, rapid, and unpredictable changes in user behavior.”) (citation omitted).
- ⁸⁵ *Id.* at 11 (“These findings [on rates of abandonment based on user expectations of speed] have significant implications for a two-tiered Internet. Merely having a ‘fast lane’ for paid traffic will alter consumers’ perception of the standard for speed. When consumers become accustomed to receiving video at a certain delivery rate, that rate will become the *de facto* standard and everything else will be perceived as substandard. Consumers are unlikely to know (or care) about why a particular video takes two seconds to load or is constantly rebuffering, and will abandon those edge providers that they perceive as providing a slower, and thus less enjoyable, experience.”).
- ⁸⁶ Advocates of de-regulation (i.e., opponents of net neutrality) point to a different history--the economic history of failed regulatory attempts at preventing anti-competitive behavior by vertically integrated firms that enjoy market power at one level of the vertical chain of production. See, e.g., Bruce M. Owen, *The Net Neutrality Debate: Twenty Five Years after United States v. AT&T and 120 Years after the Act to Regulate Commerce*, (Stanford Inst. for Econ. Policy Research, Stanford Law & Econ. Olin Working Paper No. 336, 2007).
- ⁸⁷ See Adam Liptak, *In Reversal, Verizon Says It Will Allow Group’s Texts*, N.Y. TIMES (Sept. 28, 2007), at A20; see also Comments of March 14, 2008 of T-Mobile, Inc. at 6-7, in the Matter of Public Knowledge et al. for a Declaratory Ruling Stating that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, 79 Fed. Reg. 4,866 (Jan. 28, 2008).
- ⁸⁸ See Edward Moyer, *T-Mobile Sued for Allegedly Blocking Pot-Related Texting*, CNET NEWS, Sept. 18, 2010, available at http://news.cnet.com/8301-13578_3-20016908-38.html.
- ⁸⁹ *A.C.L.U. v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).
- ⁹⁰ President Barack Obama, *Net Neutrality: President Obama’s Plan for a Free and Open Internet* (Nov. 10, 2014), available at <http://www.whitehouse.gov/net-neutrality>.
- ⁹¹ See, e.g., *ITHIEL DE SOLA POOL, TECHNOLOGIES AND FREEDOM* 75107 (1983).

- ⁹² *Id.* at 106.
- ⁹³ Jerome A. Barron, *The Telco, The Common Carrier Model, and The First Amendment - The "Dial-A-Porn" Precedent*, 19 RUTGERS COMPUTER & TECH. L.J. 371, 383 (1993).
- ⁹⁴ See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 251-52 (2002).
- ⁹⁵ *Id.*
- ⁹⁶ DE SOLA POOL, *supra*, note 91, at 106.
- ⁹⁷ *Primrose v. W. Union Tel. Co.*, 154 U.S. 1 (1893). Common carriage obligations were also imposed on transportation providers. The Interstate Commerce Act of 1887 imposed affirmative common carriage obligations on railroads, requiring them to serve the public, to connect their tracks to one another, and prohibiting them from engaging in price discrimination.
- ⁹⁸ Speta, *supra* note 94, at 261-262.
- ⁹⁹ 47 U.S.C. §151 (1934).
- ¹⁰⁰ See *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232 (1936). Under the Communications Act of 1934, common carriage obligations were imposed upon companies that were (1) engaged in interstate communication, (2) by wire, (3) by any entity engaged as a common carrier for hire. The Act's definition of common carrier looked to "whether the carrier holds itself out indiscriminately to a class of persons for service," regardless of whether the entity enjoyed monopoly power. 47 U.S.C. §151 (1934).
- ¹⁰¹ *Sable Commc'ns, Inc. v. F.C.C.*, 492 U.S. 115 (1989).
- ¹⁰² Communications Act of 1934, 47 U.S.C. §151 (1934); *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 525 F.2d 630, 641-42 (D.C. Cir. 1976).
- ¹⁰³ *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1976).
- ¹⁰⁴ *Id.*
- ¹⁰⁵ *Id.*
- ¹⁰⁶ See Daniel Brenner, *Telephone Company Entry into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 106 n. 24 (1991).
- ¹⁰⁷ See, e.g., Barron, *supra*, note 93, at 377, 389 (explicating the dichotomy between the publisher/broadcaster model and the common carrier model).
- ¹⁰⁸ Barron, *supra* note 93, at 377, 382-85; Brenner, *supra*, note 106, at 98.
- ¹⁰⁹ See Amendment of Section 47 C.F.R. § 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C. 2d 384, P 5 (1980).

- ¹¹⁰ Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Notice of Inquiry*, 7 F.C.C.2d 11, 8 Rad. Reg. 2d (P & F) 1567 (1966); *Second Computer Inquiry, Final Decision*, 77 F.C.C.2d 384, 47 Rad. Reg. 2d (P & F) 669 (1980); Amendment of Section 64.702 of the Comm’n’s Rules and Regs. (Third Computer Inquiry), *Report and Order*, 104 F.C.C. 958 (1986).
- ¹¹¹ *Second Computer Inquiry, Final Decision*, 77 F.C.C.2d 384, P 96, P 102, 47 Rad. Reg. 2d (P & F) 669 (1980) [hereinafter “Computer II Final Decision”]. Basic service is the offering of “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” *Id.* at P 98. *See also* text accompanying notes 57.
- ¹¹² *See, e.g.*, Computer II Final Decision, P 97; *Establishment of a Funding Mechanism for Interstate Operator Servs. For the Deaf, Memorandum Opinion and Order*, 11 F.C.C.R. 6808, P 16, 2 Comm. Reg. (P & F) 744 (1996) (An enhanced service employs “computer processing applications” that: (1) “act on the format, content, code, protocol or similar aspects of a subscriber’s transmitted information”; (2) provide the subscriber “additional, different, or restructured information”; or (3) “involve subscriber interaction with stored information.” Computer II Final Decision, P 97); *see also* text accompanying notes 57.
- ¹¹³ *See* Telecommunications Act of 1996 § 3(49), § 102(e)(2), § 301(j), 47 U.S.C. § 152, 153(11) (2013).
- ¹¹⁴ Telecommunications Act of 1996 § 3(a)(49), 47 U.S.C. § 153(51) (2013); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 F.C.C.R. 7418, P 2 n.6 (2001) (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, 11516-17, 11520, 11524, PP 33, 39, 45-46 (1998)) (“The Commission has concluded that Congress sought to maintain the basic/enhanced distinction in its definition of ‘telecommunications services’ and ‘information services,’ and that ‘enhanced services’ and ‘information services’ should be interpreted to extend to the same functions.”).
- ¹¹⁵ *Id.*
- ¹¹⁶ Communications Act of 1934, § 3(44), (codified as amended 47 U.S.C. § 153 (1991)).
- ¹¹⁷ *See* Telecommunications Act of 1996 § 3(49), § 102(e)(2), § 301(j), 47 U.S.C. § 152, 153(11) (2013).
- ¹¹⁸ *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 97576 (2005).
- ¹¹⁹ *Id.* The Act provides that common carriers must furnish service upon reasonable request and must establish reasonable charges, practices, classifications, and regulations regarding service. This section also imposes obligations upon common carriers to interconnect with the facilities and services of other carriers and end users, and sets out the terms and conditions under which incumbent carriers must interconnect with newcomer carriers.
- ¹²⁰ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, P 7 (2002).
- ¹²¹ *Id.*
- ¹²² *Id.* P 39.
- ¹²³ *See Brand X*, 545 U.S. at 996.

- ¹²⁴ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 PP 75, 77, 95 (2002), *subsequent history omitted*.
- ¹²⁵ *Id.* at P 38.
- ¹²⁶ *Id.*; see *Brand X*, 545 U.S. at 978 (citations omitted).
- ¹²⁷ For transition purposes, the Wireline Broadband Order required that DSL providers continue to provide existing wireline broadband Internet access transmission offerings on a grandfathered basis to unaffiliated ISPs for one year after the date of the order's publication of September 25, 2005. See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853, PP 5-6 (2005).
- ¹²⁸ See, e.g., Rob Frieden, *Neither Fish Nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. TELECOMM. & HIGH TECH. L. 373 (2008).
- ¹²⁹ See DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE, ch. 6 (2009).
- ¹³⁰ DE SOLA POOL, *supra* note 91, at 106.
- ¹³¹ See NPRM, *supra* note 2, at P 159.
- ¹³² See Joint Brief for Verizon and MetroPCS at 43, *Verizon v. F.C.C.*, No. 11-1355, 2012 WL 9937411, at *43 (D.C. Cir. 2012) (arguing that “[j]ust as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others. Although broadband providers have generally exercised their discretion to allow all content in an undifferentiated manner, they nevertheless possess discretion that [net neutrality regulations] preclude them from exercising.”).
- ¹³³ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).
- ¹³⁴ See *Turner Broad. Sys. v. F.C.C. (Turner I)*, 512 U.S. 622 (1994).
- ¹³⁵ *Id.* at 656 (emphasis added).
- ¹³⁶ *Id.* at 657.
- ¹³⁷ *Turner Broad. Sys. v. F.C.C. (Turner II)*, 520 U.S. 180 (1997).
- ¹³⁸ *Id.* at 189-90.
- ¹³⁹ *Id.* at 22627 (Breyer, J., concurring).
- ¹⁴⁰ *Id.* at 227.
- ¹⁴¹ As FCC Chairman Tom Wheeler recently recognized, Americans today do not have meaningful options for their choice of high-speed broadband provider. See Grant Gross, *FCC’s Wheeler: U.S. Needs More High-Speed Broadband Competition*, PC WORLD, <http://www.pcworld.com/article/2602723/fccs-wheeler-us-needs-more-highspeed-broadband-competition.html>

¹⁴² *Turner I*, 512 U.S. at 663.

¹⁴³ *Turner II*, 520 U.S. at 22627 (Breyer, J., concurring).

¹⁴⁴ *A.C.L.U. v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).